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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

THE ASIATIC PETROLEUM COMPANY (PHILIPPINE ISLANDS), LIMITED,
Petitioner,

versus

THE INSULAR COLLECTOR OF CUSTOMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS AND BRIEF IN SUPPORT THEREOF

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INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

Statement 2

Decision, and Question Presented..... 2

The Facts 3

REASONS FOR GRANTING THE WRIT

1. The Supreme Court of the Philippine Islands has rendered a decision in conflict with the decision of the Court of Claims in *Kennedy* v. *United States*, 23 Ct. Cl. 363 5

2. The Supreme Court of the Philippine Islands has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court..... 6

3. The decision affects substantially and adversely all persons importing fuel into the Philippine Islands, for resale in ocean commerce..... 7

Assignments of Error..... 7

BRIEF IN SUPPORT OF PETITION

Opinions Below 9

Jurisdiction 9

Argument 9

CASES CITED

PAGE

Adams Express v. *Kentucky*, 238 U. S. 190, 199..... 9

Campbell v. *United States*, 107 U. S. 407, 413.....6, 10

Cunard S. S. Co. v. *United States*, 25 Ct. Cl. 428.... 5

Gsell v. *Insular Collector of Customs*, 239 U. S. 93... 9

Kennedy v. *United States*, 23 Ct. Cl. 363..... 5

Miller, Collector v. *Standard Nut Margarine Co.*, 284 U. S. 498 7

Raybestos-Manhattan, Inc. v. *United States*, 295 U. S. 727 5

Swann and Finch v. *United States*, 19 U. S. 143, 146..6, 10

United States v. *Hill*, 248 U. S. 420, 424..... 9

STATUTES CITED

Act of Congress of August 5, 1909 (Philippine Tariff Law; L. 1909, Ch. 8, Sec. 21, 36 Stat. 176)..2, 4, 6, 7, 9

Act of February 13, 1925, C. 229 § 7; 43 Stat. 940... 9

Act of March 3, 1883, Schedule N (22 Stat. 511).... 5

Act of June 19, 1886 [24 Stat. 81, Sec. 10]..... 5

Section 275 of the Code of Civil Procedure of the Philippine Islands 4

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Asiatic Petroleum Company (Philippine Islands) Limited, respectfully prays for a writ of certiorari to the Supreme Court of the Philippine Islands to review a judgment of that Court, entered July 26, 1935, affirming by a divided Court (six judges voting for affirmance and four for reversal) a judgment of the Court of First Instance of Manila; and also, from a decision rendered by said Supreme Court of the Philippine Islands on July 20, 1935, denying your petitioner's motion for reconsideration. A certified transcript of the record in this case,

including the proceedings in said Supreme Court of the Philippine Islands, is furnished herewith in accordance with Rules 38, par. 1, and 42 of the Rules of this Court.

The judgment below denied petitioner's petition for a writ of mandamus requiring respondent to sign and issue the necessary warrants for the refund to petitioner of the amount, less one per cent., of the duties which it had paid on imported fuel oil which it subsequently sold for the propulsion of vessels (of foreign registry) engaged in trade with foreign countries, for which refund it had duly filed drawback entries.

Statement.

This case involves the interpretation of the Act of Congress of August 5, 1909 (Philippine Tariff Law; L. 1909, Ch. 8, Sec. 21, 36 Stat. 176), which is as follows:

> "Sec. 21. That on all fuel imported into the Philippine Islands which is afterwards used for the propulsion of vessels engaged in trade with foreign countries, or between ports of the United States and the Philippine Islands, or in the Philippine coastwise trade, a refund shall be allowed equal to the duty imposed by law upon such fuel, less one per centum thereof, which shall be paid under such rules and regulations as may be prescribed by the insular collector of customs."

Decision, and Question Presented.

The only question presented is one of law, namely, whether the refund thus provided for is payable with re-

spect to fuel oil used for the propulsion of vessels of *foreign registry* engaged in trade with foreign countries [R. 136]. The decision and judgment sought to be reviewed determine that it is not [R. 139].

The facts are presented by stipulation [R. 28-30] and twenty-two written exhibits annexed thereto [R. 30-127].

The Facts.

Your petitioner is a corporation of the Philippine Islands.

The respondent is the Insular Collector of the Philippines.

On various dates during the latter part of 1932 and the first semester of 1933, petitioner imported quantities of fuel oil into the Philippine Islands and paid the appropriate duties thereon [R. 30-126].

Petitioner sold part of said fuel oil to local agents of foreign shipping firms, subject to the agreement with said firms that drawbacks of customs duties paid on said fuel oil were to be for the account of petitioner [R. 30-126].

In due course said oil was put into the fuel tanks of various vessels of British, Swedish, Dutch, Danish or Norwegian registry, and was used by them for their propulsion while engaged in trade between the Philippine Islands and foreign countries [R. 29].

In each case, petitioner filed with respondent a certificate of such sale; the latter directed the Surveyor of the Port of Manila to superintend the transfer of the oil to the designated vessel and make return to respondent; and such surveyor did certify to respondent the correct weight of the fuel oil thus laden [R. 30-126].

Petitioner then prepared and presented to respondent the appropriate drawback entries and requested that the customs duties paid on said fuel oil, less one per cent. thereof, be refunded to it as provided in Section 21 of said Tariff Law of 1909 [R. 30-126].

Respondent refused to authorize or pay said drawbacks, on the sole ground that the Secretary of Justice of the Philippine Islands in an opinion rendered on July 28, 1933, had determined that drawbacks of customs duties on imported fuel oil can only be allowed under said Section 21 of the Law of 1909 [36 Stat. 176], when such fuel is used for the propulsion of vessels of Philippine registry [R. 127].

This ruling reversed the prior ruling and practice of the Insular Collector of Customs which had theretofore been in effect since the enactment of the Law of 1909. This earlier ruling, although not directly established by evidence at the trial, was a matter of which the insular courts were required to take judicial notice [Section 275 of the Code of Civil Procedure of the Philippine Islands] and was directly presented to the Supreme Court on petitioner's application for a reconsideration [R. 159-161]. It is established indirectly by respondent's course of conduct in receiving some twenty-one certificates of sale of fuel oil to vessels of known foreign registry, and issuing directions for survey to the Surveyor of the Port of Manila, and accepting and holding certificates of survey and claims for refund until five days after the rendering of said opinion by the Minister of Justice [R. 127].

REASONS FOR GRANTING THE WRIT.

1.

The Supreme Court of the Philippine Islands has rendered a decision in conflict with the decision of the Court of Claims in Kennedy v. United States, 23 Ct. Cl. 363.

A reviewable conflict is thus presented (*Raybestos-Manhattan, Inc.* v. *United States,* 295 U. S. 727).

The *Kennedy* case had under consideration the Act of March 3, 1883, Schedule N (22 Stat. 511), which then provided:

> "A drawback of seventy-five cents per ton shall be allowed on all bituminous coal imported into the United States which is afterwards used for fuel on board of vessels propelled by steam which are engaged in the coasting trade of the United States, or in the trade with foreign countries, to be allowed and paid under such regulations as the Secretary of the Treasury shall prescribe."

It was held that the right to drawback thus established was not limited to vessels of the United States, and this in spite of the enactment, subsequent to the accrual of claimant's right, of the Act of June 19, 1886 [24 Stat. 81, Sec. 10], which restricted said right to a drawback "to vessels of the United States."

We have found no decision in the United States or, prior to the present case, in the Philippines or elsewhere, which is contrary to the above decision. It was approved, at least inferentially, in *Cunard S. S. Co.* v. *United States,* 25 Ct. Cl. 428.

2.

The Supreme Court of the Philippine Islands has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court.

The Philippine Supreme Court decided that the refund provided for in this Act of Congress [36 Stat. 176, Sec. 21] was intended "to foster and give impetus to the establishment and promotion in these Islands of a merchant marine engaged not only in coastwise but also in foreign trade" [R. 139], this being also the interpretation placed thereon by the Philippine Secretary of Justice and by respondent [R. 127]. The effectuation of this supposed congressional purpose is the substantial basis of the decision [R. 142].

In *Campbell* v. *United States,* 107 U. S. 407, 413, it is said:

> "It has never been supposed that there was a gratuity in all the cases where imports are free of duty. The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country,—articles which are not sold or consumed in the United States."

The intent of such legislation is to aid local manufacture and trade.

Campbell v. *United States, supra;*
Swann and Finch v. *United States,* 190 U. S. 143, 146.

3.

The decision affects substantially and adversely all persons importing fuel into the Philippine Islands, for resale in ocean commerce.

Petitioner and others similarly engaged in such business conducted it on the strength of, and in reliance upon, the previous policy and ruling of respondent and his predecessors in office. If the rule laid down in this decision be applied retroactively to these transactions, the moderate profits derived therefrom will be transformed into substantial losses. *Miller, Collector* v. *Standard Nut Margarine Co.*, 284 U. S. 498.

If the rule of the decision be applied in the future, it will prevent petitioner and others similarly engaged from competing effectively with foreign dealers in fuel. The increase one hundred fold of the import duty can have no other effect.

Assignments of Error.

The Supreme Court of the Philippine Islands erred:

1. In holding that Section 21 of the Act of August 5, 1909 (L. 1909, Ch. 8, Sec. 21) does not authorize a refund of the tariff duties, less 1% thereof, paid on fuel oil used to propel vessels of foreign registry in trade between the Philippine Isiands and foreign countries.

2. In refusing to issue the writ petitioned for in this case and in entering judgment for respondent.

3. In denying petitioner's motion for a reconsideration and a new trial.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Supreme Court of the Philippine Islands, commanding said court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Supreme Court had in this case, to the end that this case may be reviewed and determined by this Court; that the judgment of said Supreme Court be reversed; and that your petitioner be granted such other and further relief as may seem proper.

WM. D. WHITNEY,
Counsel for Petitioner.

January 2, 1936.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinions of the Court of First Instance of Manila [R. 127-131] and of the Supreme Court of the Philippine Islands [R. 134-154] have not yet been reported.

Jurisdiction.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, c. 229, § 7; 43 Stat. 940 (see *Gsell* v. *Insular Collector of Customs,* 239 U. S. 93).

Argument.

The Philippine Tariff Law (36 Stat. 176, Sec. 21) directs the payment of a refund "on all fuel imported into the Philippine Islands which is afterward used for the propulsion of vessels engaged in trade with foreign countries * * *."

The Philippine Secretary of Justice [R. 127] and the Judge of the Court of First Instance [R. 130] have read into this statutory provision the phrase "of Philippine Registry."

The majority opinion in the Supreme Court has widened the limitation thus attempted to be read into the statute, by adding thereto vessels of American registry.

The statute is perfectly clear and unambiguous, both in its language and in its application to the facts. It leaves no room for construction (*United States* v. *Hill,* 248 U. S. 420, 424; *Adams Express* v. *Kentucky,* 238 U. S. 190, 199).

The construction adopted is unwarranted and erroneous (*Kennedy* v. *United States,* 23 Ct. Cl. 363).

The Act directs the "refund" of a tax previously paid by an importer. There is no basis in law or fact for the assumption, indulged in by the Philippine Courts and customs authorities, that the local merchant marine or that of the United States was its intended beneficiary.

Campbell v. *United States,* 104 U. S. 407 (*supra*);
Swann and Finch v. *United States,* 190 U. S. 143 (*supra*).

WM. D. WHITNEY,
Counsel for Petitioner.

January 2, 1936.

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